Supreme Court, U.S.
FILED
APR 17 2009
OFFICE OF THE CLERK

No. 08-1483

IN THE

SUPREME COURT OF THE UNITED STATES

BRANDON KUIIN, d.b.a. CRYSTAL CAVERNS

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES

On Petition For Writ Of Certiorari
To The United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

BRANDON KUHN, Petitioner Pro Se
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San Antonio, Texas 78266
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QUESTION PRESENTED FOR REVIEW:

The question before this honorable court must be prefaced as follows:

I was denied a high explosives permit by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). The denial pertains to the construction of the word "punishable" as it appears in 18 U.S.C. § 842(i)(1)

> "It shall be unlawful for any person...who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year to ship or transport any explosive in or affecting interstate or foreign commerce or to receive or possess any explosive which has been shipped or transported in or affecting interstate or foreign commerce."

Simply put, I have a 1999 conviction for a violation of 18 U.S.C. § 472 ("Uttering counterfeit obligations or securities"). At the time of my sentencing, the Federal Sentencing Guidelines (still mandatory in 1999) called for an imprisonment range between 0 months and 6 months, while the statute associated with my crime called for a maximum of 15 years imprisonment.

ATF has constructed the word "punishable" to hinge only on the statute defining the offense, while I have constructed the word "punishable" to hinge on all statutes determining sentencing, including not only those that empower the court to sentence but those that limit the legitimacy of its' exercise of that power.

The question before this court is simply which construction is correct.

PARTIES TO PROCEEDING:

All parties appear on the cover of this petition, and there is no parent or publicly held company owning 10% or more of Crystal Cavern's stock.

OFFICIAL ORDERS AND BASIS FOR JURISDICTION:

The US Court of Appeals for the Fifth Circuit filed their original decision on December 2, 2008.

The same court filed a denial of petition for rehearing on January 27, 2009.

Under 81 U.S.C. § 1254, this case may be heard by the Supreme Court by writ of certiorari.

And the filing is timely.

STATUTUE OF CONSIDERATION:

18 U.S.C. § 842(i)(1)

> "It shall be unlawful for any person…who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year to ship or transport any explosive in or affecting interstate or foreign commerce or to receive or possess any explosive which has been shipped or transported in or affecting interstate or foreign commerce."

STATEMENT OF CASE:

The entire case hinges on the appropriate construction of the word "punishable" as it appears in 18 U.S.C. § 842(i)(1).

I applied to ATF for a high explosives permit. My application was denied based on ATF's construction of the word "punishable".

I requested an administrative review and was denied. Pursuant to 5 U.S.C. § 706, I appealed to the US Court of Appeals for the Fifth Circuit. The appeal was denied, and the Fifth Circuit's decision contained an egregious misrepresentation of my legal argument. (see appendix)

I requested a rehearing with the Fifth Circuit. The request was denied.

I now appeal to the US Supreme Court.

ARGUMENT:

Since this entire case hinges on the appropriate construction of the word "punishable" as it appears in 18 U.S.C. § 842(i)(1), it is wise to view any analogous constructions already made by the U.S. Supreme Court. Therefore, it is appropriate to consider the construction of the word "authorized" as found in US Supreme Court Certiorari No. 90-1577 *United States v. R.L.C.*, 503 U.S. 291 (1992). (pertinent text below)

> **"Plain meaning analysis does not compel adoption of the Government's construction that the word "authorized" in § 5037(c)(1)(C) must refer to the maximum term of imprisonment provided for by the statute defining the offense. At least equally consistent, and arguably more natural, is the construction that "authorized" refers to the result of applying all statutes with a required bearing on the sentencing decision, including not only those that empower the court to sentence but those that limit the legitimacy of its exercise of that power, including § 3553(b) which requires application of the Guidelines**

and caps an adult sentence at the top of the relevant Guideline range"

So we can see that it is correct to view the maximum term of imprisonment for an offense as limited by the sentencing guidelines created in 18 USC § 3553(b)(1), and **NOT** merely by the statute defining the offense. In *RLC*, the Government's construction of the meaning of the word **"authorized"** was flawed because it failed to take into account the Federal Sentencing Guidelines, which limit the **authorization** of punishment. Likewise, in the case currently before this court, the Government is attempting a similar construction of the meaning of the word **"punishable"** in an attempt to exclude the Federal Sentencing Guidelines from being considered. But of course if the Federal Sentencing Guidelines control the maximum term of imprisonment "**authorized**", then they also dictate which crimes are "**punishable**" by more than a year in prison, as well as which crimes are **NOT** "**punishable**" by more than a year in prison. The question of the appropriate construction now falls squarely at the feet of this court.

I hereby request a Supreme Court Ruling in order to remedy the situation.

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
December 2, 2008

Charles R. Fulbruge III
Clerk

No. 08-60550
Summary Calendar

BRANDON KUHN, doing business as Crystal Caverns

Petitioner

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES
(ATF)

Respondent

On Petition for Review from
an Order of the Department of Justice
Agency No. 5-TX-091-33-PA-01118

Before KING, DENNIS, and OWEN, Circuit Judges.

PER CURIAM:*

Brandon Kuhn ("Kuhn") petitions this court for a review of the Respondent Bureau of Alcohol, Tobacco, Firearms, and Explosives's ("ATF") denial of his application for a permit to import, manufacture, or deal in explosive materials. *See* 18 U.S.C. § 842. Kuhn appealed the ATF's decision pursuant to 18 U.S.C. § 843(e)(2). At the first level of review, an Administrative Law Judge conducted a hearing and recommended denying Kuhn's application. The Director of Industry Operations of the ATF, representing the Attorney General, sustained the denial in a written decision. Kuhn now petitions this court for review.

We review the denial of an explosives permit pursuant to the Administrative Procedure Act ("APA"), codified at 5 U.S.C. §§ 701-706. *See* 18 U.S.C. § 843(e)(2). Pursuant to 5 U.S.C. § 706(2)(A) & (C), we "hold unlawful and set aside agency action, findings, and conclusions found to be" "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

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*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4

As the reviewing court, "the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706 [1] "To the extent that this appeal challenges the Director's interpretation of the statutory provisions ATF administers, we utilize principles of *Chevron* deference." *Vineland Fireworks Co., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, --- F.3d ----, 2008 WL 4530536, at *4 (3d Cir. Oct 10, 2008) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

Pursuant to 18 U.S.C. § 842(i)(1), ATF denied Kuhn an explosives permit because "[i]t shall be unlawful for any person ... who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" to "to ship or transport any explosive in or affecting interstate or foreign commerce or to receive or possess any explosive which has been shipped or transported in or affecting interstate or foreign commerce." Kuhn argues that the application of this provision to deny his application is in error. Kuhn concedes he was previously convicted of one violation of 18 U.S.C. § 472 ("Uttering counterfeit obligations or securities"), which is an offense that has a statutory maximum penalty of 20 years imprisonment.

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[1]Kuhn has moved to strike portions of the administrative record because he alleges those portions are either incorrect or prejudicial to his case. Pursuant to § 706, we must review the entire administrative record or those parts of it cited by the parties with due account taken of the rule of prejudicial error. Kuhn does not cite to any authority that permits this reviewing court to strike portions of the record based solely on one party's wishes and conclusory allegations of prejudice. Even assuming *arguendo* that we strike the portions that Kuhn requests, any change to the administrative record does not affect our decision. We therefore deny Kuhn's motion to strike.

However, Kuhn contends that because the Sentencing Guidelines were mandatory at the time of his conviction, the term of his actual sentence controls whether he committed a crime punishable for a term exceeding one year. According to Kuhn, because his guidelines sentence was between zero to six months imprisonment, his convicted offense was not a crime punishable by imprisonment for a term exceeding one year and therefore § 841(i)(1) should not bar him from obtaining an explosives permit.

His argument is without merit. The statute's plain language indicates that the application of § 841(i)(1) turns on the term of imprisonment punishable by the offense of conviction and indictment and does not turn on the petitioner's actual sentence. In interpreting another statute with identical language, the Supreme Court has noted that "[i]t was plainly irrelevant to Congress whether the individual in question actually receives a prison term; the statute imposes disabilities on one convicted of "a crime punishable by imprisonment for a term exceeding one year."" *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 113 (1983) (interpreting 18 U.S.C. § 922(g)).[2] In other words, the petitioner's actual sentence is irrelevant to the statute's application. Since the offense of petitioner's valid conviction is punishable by imprisonment exceeding one year, the ATF acted in accordance with law and was not arbitrary nor capricious in denying his permit application.

For the foregoing reasons, the petition for review is DENIED.

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[2]This holding remains good law even though other aspects of *Dickerson* have been effectively superseded by statute. *See Caron v. United States*, 524 U.S. 308, 313 (1998); *United States v. Daugherty*, 264 F.3d 513, 516 & n.7 (5th Cir. 2001); *United States v. Cisneros*, 112 F.3d 1272, 1281 (5th Cir. 1997).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. Court of Appeals

FILED
January 27, 2009

Charles R. Fulbruge III
Clerk

No. 08-60550

BRANDON KUHN, doing business as Crystal Caverns
Petitioner

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES
(ATF)
Respondent

Petition for Review of an Order of the
U.S. Department of Justice

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 12/2/08, 5 Cir., _____, _____ F. 3d _____)

Before KING, DENNIS, and OWEN, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5TH CIR R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ James Dennis
United States Circuit Judge

REHG-5A

CLERK'S NOTE:
SEE FRAP AND
LOCAL RULES 41
FOR STAY OF
THE MANDATE